NO. 91-1307

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

FERNANDO RANGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner was denied the rights guaranteed to him by the Fifth Amendment to the United States Constitution when the United States Court of Appeals for the Fifth Circuit rendered a decision that is contrary to other decisions of that Ccurt on the same matter, and misconstrued facts that were critical to his appeal.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FERNANDO RANGEL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner Fernando Rangel respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on November 12, 1991.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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OPINION BELOW

The unpublished opinion of the court of appeals, styled *United States of America v. Fernando Rangel* and numbered Cause No. 91-8041, was entered on October 16, 1991. A copy of the opinion is attached hereto as Appendix A.

On November 12, 1991, the court of appeals denied appellant's petition for rehearing. A copy of the order is attached hereto as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 16, 1991. Thereafter, on November 12, 1991, appellant's petition for rehearing was denied. This petition is filed within ninety (90) days from the date of the denial of the petition for rehearing. SUP.CT.R. 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 3231.

On April 3, 1990, as the result of conversations with a confidential informant who was cooperating with the Drug Enforcement Administration (DEA), Luis Amavizca (Amavizca), a supervisor with the United States Border Patrol assigned to the DEA in El Paso, Texas, was involved in an undercover investigation, portraying an out of town buyer for cocaine. At approximately 9:20 a.m., Amavizca placed a call to the home of Monica Perez Mendoza (Monica Perez) and spoke to her concerning the purchase of five (5) kilograms of cocaine for $77,500.00. A meeting was arranged for 12:00 o'clock noon at the Village Inn restaurant located at 1500 Airways, in El Paso. At approximately 12:00 o'clock noon, Amavizca and Special Agent Steve Robertson (Robertson) arrived at the village Inn parking lot. At about the same time, Eduardo Perez arrived in a 929 Mazda and parked next to the agents' vehicle. Monica Perez then arrived in a Chevy Corvette and parked next to the Mazda. The four then began discussing the purchase by the two agents of five kilograms of cocaine. Monica Perez went into the restaurant stating "I'm going call her," referring to the source of the cocaine. Eduardo Perez also stated, "Go ahead and call her." Monica Perez returned and stated, "I talked to her. I told her that I had seen the money. She doesn't want to meet you guys or anything like that. They are going to meet us at our residence." Monica Perez told the agents to wait for them

(Monica Perez and Eduardo Perez) at the Village Inn, that they would be returning within 20 minutes with the cocaine.

Special Agent Jimmy Garza, DEA, observed Eduardo Perez and Monica Perez depart in the blue Mazda and followed them to the vicinity of 3531 Thomason in El Paso, where Special Agent Steven Perkins, DEA, took over the surveillance. Perkins observed the Mazda pull into the driveway of a residence located at 3531 Thomason, and both Eduardo and Monica Perez went inside. At approximately 12:40 p.m., he observed a two-toned brown van drive "very slowly" past the residence, and turn right at the corner. A few minutes later, he saw the same van again going "very slowly" by the residence, only this time the van pulled over and stopped directly in front of the residence. Monica Perez walked from the residence to the passenger side of the van, and appeared to be communicating with someone in it. A few moments later, Eduardo Perez also walked from the residence to the passenger side of the van and also appeared to be talking to someone in it. Eduardo Perez, and then Monica Perez, left the side of the van and walked back toward the residence. The van, again "very slowly," departed from the residence, with the blue Mazda directly behind it. Perkins could not identify who was in the van, but did determine that there was more than one person in it. At this point, Special Agent Tomas Lenox, DEA, took over and observed the vehicles eastbound on Flory headed for Dyer. Towards the end of Flory, the van pulled over and parked, while the Mazda made a U-turn and parked beside it. Lenox then observed appellant walking toward the passenger side of the Mazda "carrying something underneath his left arm." After a few seconds, appellant walked away from the Mazda, no longer carrying the object, and entered the driver's side of a gold Lincoln also parked on Flory. The Lincoln

then pulled out into traffic, the Mazda following, and the van following the Mazda. The vehicles eventually split up and took different directions. The Mazda returned to the Village Inn. The gold Lincoln pulled into a parking area just east of the K-Mart shopping center, where appellant got out of the vehicle and walked over to a phone booth. The van, being driven by appellant's wife, Brenda Rangel, was followed to a residence located at 2820 Grant in El Paso. There, she exited the van and entered the residence.

At approximately 1:00 p.m., Monica Perez and Eduardo Perez arrived back at the Village Inn parking lot in the blue Mazda and parked about two vehicles away from the agents' vehicle. Amavizca told Monica Perez he wanted to see the cocaine, so she opened the door and let him enter the Mazda. In the rear passenger's side of the vehicle, Amavizca observed a light colored box, approximately twelve by twelve, containing what appeared to be five kilograms of cocaine. Amavizca exited the vehicle, gave the prearranged arrest signal, and both Monica Perez and Eduardo Perez were arrested.

Appellant was then arrested as he was talking on the pay telephone in the parking area by the K-Mart shopping center. A .22 caliber revolver was discovered in appellant's left front pants pocket, and a .380 caliber pistol was discovered between the seats of the Lincoln. It was determined that appellant was talking with his wife, Brenda Rangel, at the time of his arrest. An address book was also discovered on appellant with "Monica, 566-0716," and "544-5665" written in it. Brenda Rangel was arrested shortly thereafter at the residence located at 2820 Grant.

On April 4, 1991, appellant was named in a three-count indictment that charged him in Count One with conspiring with co-defendants Brenda Rangel, Eduardo Perez,

and Monica Mendoza-Perez, and with other unknown persons, to possess a quantity of more than 500 grams of cocaine, a Schedule II Controlled Substance, with intent to distribute same, in violation of Title 21, United States Code, Sections 841 (a) (1) and 846; Count Two charged appellant, Brenda Rangel, Eduardo Perez, and Monica Mendoza-Perez with possessing a quantity of more than 500 grams of cocaine, a Schedule II Controlled Substance, with intent to distribute same, in violation of Title 21, United States Code, Sections 841 (a) (1); and, Count Three charged appellant with using a firearm during and in relation to a drug trafficking crime, in violation of Title, 18, United States Code, Section 924 (c) (1).

Appellant entered a plea of not guilty and jury trial commenced on October 29, 1990. On October 30, 1990, the jury returned verdicts of guilty as charged in each count of the indictment.

On January 4, 1991, the Court sentenced appellant to one hundred twenty-one (121) months of imprisonment followed by four (4) years of supervised release as to Count One, one hundred twenty-one (121) months of imprisonment followed by four (4) years of supervised release as to Count Two, the sentence imposed in Count Two to be served concurrently with that imposed in Count One. With respect to Count Three, the Court sentenced appellant to sixty (60) months of imprisonment followed by three (3) years of supervised release, the sentence of imprisonment to be served consecutively to the sentence imposed in Counts One and Two, and the supervised release to be served concurrently with that imposed in Count One.

On appeal, Petitioner argued that the evidence presented by the government was legally insufficient to establish beyond a reasonable doubt his knowledge of, in-

tention to join, and voluntary participation in an agreement to violate the law.

The Fifth Circuit disagreed. After stating the facts as set out above, the Court, without explanation, simply stated:

> "The evidence is sufficient for a rational jury to have concluded that Rangel was Monica Perez's 'source,' that he delivered the cocaine to her, and that he carried the firearms for protection or intimidation purposes during the drug transaction. The evidence is sufficient to support the convictions on all of these counts. Rangel's convictions are therefore affirmed."

Appendix A, at 5.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS RENDERED A DECISION THAT IS CONTRARY TO OTHER DECISIONS OF THAT COURT ON THE SAME MATTER.

The Court has rendered a decision that is contrary to other decisions of the Fifth Circuit holding the evidence to be insufficient to support a conspiracy conviction based upon facts even stronger than those found in the present case. For example, in *United States v. Gardea Carrasco*, 830 F.2d 41 (5th Cir. 1987), it was established that Gracielo Gardea Carrasco (Gracielo) and Jesus Carrasco Valdez (Jesus) drove from Presidio, Texas, to the airport just outside of town. Jesus stayed in the car while Gracielo went into a house-trailer on the premises to talk to the manager of the airport and pilot. Gracielo asked the manager to transport three suitcases full of marijuana from Presidio to

the airport by automobile and then to take the suitcases by plane to McCamey, Texas. The manager informed U.S. Customs and was advised to cooperate with Gracielo. The next day Gracielo returned to the airport with his brother Sabino and Jesus. Gracielo repeated his request to the manager outside of earshot of the others. The manager refused to drive the suitcases from town to the airport, but stated his wife and niece would do so in his pickup truck. Later, the manager's wife and niece followed Gracielo to a house where he, Sabino, and a third individual loaded three suitcases onto the truck. The manager's wife and niece drove the truck back to the airport, and the Customs agents were notified. Savino and Jesus arrived at the airport a short time later. Sabino asked the manager's wife where he was, and she replied that he was on a flight to Colorado. The wife then stated that "they" told her to radio her husband to return to the airport, pick them up, and fly them to McCamey. She radioed her husband and he returned. Sabino and Jesus then carried the three suitcases from the truck to the plane. Agents then arrived and arrested Sabino and Jesus. Inside the suitcases was 142 pounds of marijuana. Gracielo was arrested sometime later. On appeal, Jesus complained that the evidence was insufficient to support his convictions for conspiracy to possess, and possession of marijuana. With respect to the conspiracy conviction, the Court reversed stating that

> "No evidence, circumstantial or otherwise, establishes his knowledge of the conversations that took place out of his hearing, of the contents of the suitcases he helped carry to the airplane, or of the purpose of their transportation to McCamey. Neither his association with those involved in the conspiracy nor his presence at the airport before and during the arrests is sufficient to sustain a conspiracy conviction." *Id.* at 45.

With respect to the possession conviction, the Court again reversed. Although Jesus had physical possession of the suitcases at the time of the arrest,

> "the prosecution failed to offer evidence proving beyond a reasonable doubt that he knew what they contained or why he was to accompany them to McCamey. In the absence of such proof, his conviction cannot stand." *Id.*

In *United States v. Moreno*, 878 F.2d 817 (5th Cir. 1989), the government had established that a codefendant had been given a telephone number to contact "Justo" in the United States, and that appellant's name was Justiniano Orguiza; the government had taped an incriminating conversation with an individual who identified himself as "Justo" but who was *not* identified as Orguiza; Orguiza was seen in the company of the other defendants on the day of the arrest; Orguiza had the keys to another codefendant's apartment; and, in that codefendant's apartment the police found a city of Houston water receipt made out to Orguiza listing an address that corresponded to the telephone number for "Justo" given to the first codefendant mentioned above. This Court reversed the conspiracy conviction of Justiniano Orguiza, finding that "no reasonable trier of fact could have found, beyond a reasonable doubt, that Orguiza conspired to possess cocaine." *Id.* at 822.

And, in *United States v. Espinoza-Seanez*, 862 F.2d 526 (5th Cir. 1988), a border patrol helicopter pilot had been informed that a sensor had been activated approximately two and one-half miles from the border between Mexico and New Mexico in an area that suspected illicit border activity was taking place. The pilot had already observed a vehicle driving toward this area from the direction of El Paso. The vehicle stopped, remained parked with its lights off for

roughly five minutes, and then turn around and head back towards El Paso. Continuous surveillance was maintained on the vehicle for approximately an hour and a half, at which time it was stopped on I-10 one mile east of Sunland Park, in El Paso. Prior to making the stop, the vehicle was observed riding very low in the back, indicating that it was carrying a heavy load in the trunk. The driver and lone occupant of the car, Gilberto Espinoza-Seanez (Gilbert), was nervous and sweating profusely. He was arrested and 225 pounds of marijuana was found in the trunk. Gilbert agreed to cooperate by making a prearranged drop off of the marijuana. He took the agents to a bar in El Paso, where Gilbert's brother Ernesto met him, and was arrested. Ernesto also agreed to cooperate with the agents. He drove the vehicle loaded with the marijuana to an El Paso restaurant, leaving it parked in the lot, where it was to be picked up. Roughly 40 minutes later, Lazarin drove into the parking lot and parked his car several yards from the vehicle. An unidentified Hispanic male got out of Lazarin's car, quickly got into the loaded vehicle and drove away before the agents could stop him. The agents then arrested Lazarin and a third individual in Lazarin's car. In Lazarin's car was a mobile telephone and Lazarin himself had $1,760.00 on his person. Ernesto had approximately $1700.00 in his possession at the time of his arrest.

Gilbert, Ernesto and Lazarin were tried and convicted for conspiring to possess marijuana for distribution. Relevant to the present case is Lazarin's conviction. In reviewing the sufficiency to support his conviction, the Court first summarized the evidence adduced by the government against him:

1. After Ernesto made a phone call, and took the agents to the restaurant, Lazarin drove to the rendezvous with two other men in the car.

2. After Lazarin parked the car, one of the men got out of Lazarin's car and into the load car and drove it off quickly.

3. After Lazarin was arrested, a cellular phone was found in his car.

4. Lazarin had approximately the same amount of money on his person as Ernesto had.

In reversing Lazarin's conviction, the Court again stressed that "[m]ere presence cannot establish either knowledge or participation in a conspiracy." *Id.* at 537. The Court reviewed several similar cases in which the evidence was held to be insufficient to support a conspiracy conviction,[1] and stated that although "[a] reasonable jury might have found that Lazarin participated in the conspiracy by transporting the unidentified Hispanic male who drove off the load car . . . no evidence was ever introduced from which a reasonable jury could find that Lazarin *knew* of the conspiracy. . . . 'Too many innocent scenarios jibe with the sparse record fact.' " *Id.* at 538 (citing *United States v. Gonzalez*, 703 F.2d 807, 808 (5th Cir. 1983)) (emphasis in original).

II. A SIGNIFICANT FACT HAS BEEN MISCONSTRUED BY THE COURT OF APPEALS, WHICH FACT WAS CRITICAL TO PETITIONER'S ARGUMENT THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT HIS CONVICTION.

In its opinion, the Court states that the facts re-

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[1] In one of the cases, *United States v. Jackson*, 700 F.2d 181 (5th Cir. 1983), one of the defendants, just as Lazarin in *Espinoza-Seanez*, and Petitioner herein, appeared at the rendezvous at the appointed time. In reversing his conviction for conspiracy, the Court stated that "[h]is conviction may not rest on mere conjecture and suspicion." *Id.* at 185-86.

vealed the following:

> "The record evidence reveals that DEA agents operating in an undercover capacity negotiated with Monica and Eduardo Perez to buy five kilograms of cocaine. During their negotiations, Monica Perez left briefly to call her source for the cocaine and returned, stating that she had arranged to meet her "source" at the Perez's residence."

Appendix A, at 4.

However, the opinion fails to mention, and it was uncontroverted, the *both* Monica and Eduardo Perez referred to their "source" as a *female.* Monica Perez went into the restaurant stating "I'm going call *her,*" referring to the source of the cocaine. Eduardo Perez also stated, "Go ahead and call *her.*" Monica Perez returned and stated, "I talked to *her.* I told *her* that I had seen the money. *She* doesn't want to meet you guys or anything like that."

This fact is particularly significant in the present case because of the absence of other evidence connecting Petitioner with the Perez's cocaine conspiracy. For example, as stated in the Court's opinion, the Perez's stated that they were going to meet their "source" at their residence. And, although the Perez's did return to their residence. appellant was never observed there. Appellant's *only* involvement established by the record was the observation by the agents of him walking over to the passenger's side of the Perez's Mazda "*carrying something underneath his arm.*" Appellant submits that it is inconceivable to conclude that the "something" observed by the surveillance agents[2] was

[2] The agents had a clear view of appellant and were using binoculars to observe him, and yet did not describe the "object" appellant was carrying as a cardboard box.

the cardboard box ultimately discovered in the back seat of the Mazda containing the five kilograms of cocaine. Petitioner's fingerprints were not discovered on either the box or the packages contained therein.

CONCLUSION

For the forgoing reasons, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,

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By: /s/ Robert Ramos
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APPENDIX A

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-8041
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

FERNANDO RANGEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(EP 90 CR 162 (H))

(October 16, 1991)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM:[1]

A jury found Fernando Rangel guilty of conspiring to possess with intent to distribute more than 500 grams of cocaine under 21 U.S.C. §§ 846 and 841(a) (1), possessing

[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

with intent to distribute more than 500 grams of cocaine under 21 U.S.C. § 841(a) (1), and using a firearm in relation to a drug-trafficking crime under 18 U.S.C. § 924(c) (1). In this appeal, Rangel challenges the sufficiency of the evidence to support his conviction. Our review of the record reveals that the evidence was sufficient. We therefore affirm the conviction.

I.

Rangel contends that the evidence is insufficient to support his convictions. Rangel concedes that a conspiracy existed but argues that the government failed to prove that he knew of or participated in the conspiracy. In addition, Rangel asserts that the government did not prove that he was in possession of the cocaine.

This Court must determine whether, viewing the evidence and the inferences that may be drawn from it in the light most favorable to the government, a rational jury could have found the essential elements of the offenses beyond a reasonable doubt. *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). In reviewing the sufficiency of the evidence, we resolve all inferences and credibility assessments in favor of the jury verdict. *United States v. Singh*, 922 F.2d 1169, 1173 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2066, 114 L.Ed.2d 471 (1991).

The essential elements of a § 846 conspiracy charge consist of (1) the existence of a conspiracy, (2) the defendant's knowledge of the conspiracy, and (3) the defendant's voluntary participation in the conspiracy. *United States v. Kaufman*, 858 F.2d 994, 999 (5th Cir. 1988). Mere presence at the crime scene or close association with co-conspirators is insufficient to support an inference of participation in a

conspiracy. Nevertheless, the jury may consider presence and association, along with other evidence, in finding conspiratorial activity by the defendant. *United States v. Lechuga*, 888 F.2d 1472, 1476-77 (5th Cir. 1989); *United States v. Magee*, 821 F.2d 234, 239 (5th Cir. 1987).

The essential elements of possession of cocaine with intent to distribute consist of (1) possession, (2) knowledge, and (3) intent to distribute cocaine. *United States v. Price*, 869 F.2d 801, 804 (5th Cir. 1989). Section 841(a) (1) requires the government to prove either actual or constructive possession. *United States v. Randall*, 887 F.2d 1262, 1268 (5th Cir. 1989). This Court has defined actual possession "as knowingly having direct physical control over a thing at a given time." *Id.*

Finally, with respect to the firearms offense, the government must prove beyond a reasonable doubt that Rangel committed a drug-trafficking offense and additionally that, during and in relation to that crime, Rangel knowingly and intentionally used or carried a firearm. *Id.* The government must only demonstrate that the firearms were within Rangel's possession or control in circumstances indicating that they "facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others." *Id.* (quoting *United States v. Stewart*, 779 F.2d 538, 540 (9th Cir. 1985), *cert. denied*, 484 U.S. 867, 108 S.Ct. 192, 98 L.Ed.2d 144 (1987)).

II.

The record evidence reveals that DEA agents operating in an undercover capacity negotiated with Monica and Eduardo Perez to buy five kilograms of cocaine. During their negotiations, Monica Perez left briefly

to call her source for the cocaine and returned, stating that she had arranged to meet her "source" at the Perez's residence. Agents followed the Perezes to their home and observed them park their blue Mazda in the driveway and enter the house. A short time later, a brown van, after driving slowly by the house once, parked in front of it. The Perezes came out to the van and spoke with someone in the van on the passenger's side. The Perezes then got back into their car and drove away, following the van.

DEA agents trailed the two vehicles, which stopped and parked in the vicinity of a gold Lincoln. The agents next saw appellant Rangel walk over to the passenger's side of the Perez's Mazda, "carrying something underneath his arm." A few seconds later, Rangel, no longer carrying the object, got into the Lincoln and drove away. The Mazda and the van followed the Lincoln.

Agents followed all three vehicles. Rangel's wife drove the van to their house. Rangel pulled into a shopping center parking lot and walked over to a phone booth. The Perezes returned to meet the undercover agents. When the Perezes arrived, one of the agents got into the Mazda where he was shown a small box, in the rear on the passenger's side, that contained the cocaine. After he saw the cocaine, the agent gave a prearranged signal, and DEA agents arrested all of the parties.

Agents arrested Rangel at the phone booth, talking on the phone with his wife. The agents discovered a .22 caliber revolver in Rangel's left pants pocket and an address book containing Monica Perez's phone number. In addition, the agents searched the Lincoln and found a loaded .380 caliber semi-automatic pistol. Rangel admitted that both weapons belonged to him.

The evidence is sufficient for a rational jury to have concluded that Rangel was Monica Perez's "source," that he delivered the cocaine to her, and that he carried the firearms for protection or intimidation purposes during the drug transaction. The evidence is sufficient to support the convictions on all of these counts. Rangel's convictions are therefore affirmed.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8041

FILED
NOV 12 1991

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FERNANDO RANGEL,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(NOVEMBER 12, 1991)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied*.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

REHG-4